KEONG SHEW PENG A

v.

PP

HIGH COURT MALAYA, PULAU PINANG B
NORDIN HASSAN JC
[CRIMINAL APPEAL NO: 42(ORS)-13-3-2014]
26 SEPTEMBER 2014

CRIMINAL PROCEDURE: *Forfeiture - Dangerous Drugs - Forfeiture of property under Dangerous Drugs (Forfeiture of Property) Act 1988 - Presumption of illegal property - Whether rebutted - Dangerous Drugs (Forfeiture of Property) Act 1988, s. 35* C

CRIMINAL PROCEDURE: *Forfeiture - Dangerous Drugs - Forfeiture of property under Dangerous Drugs (Forfeiture of Property) Act 1988 - Whether s. 35 applicable to claim under s. 32 of the Act - Whether property seized were illegally obtained* D

CRIMINAL PROCEDURE: *Appeal - Appeal against order of forfeiture - Misdirection on standard of proof - Whether curable - Whether occasioned failure of justice - Criminal Procedure Code, s. 422* E

On 12 May 2011, the appellant's father and another person were detained and later charged under s. 39B of the Dangerous Drugs Act 1952 ('DDA') for drug trafficking. Upon investigation, the F appellant was served with a notice under s. 25(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 for the seizure of several bank accounts under her name. She wrote to the police for the release of the money in the bank accounts, to which the Public Prosecutor had then referred her claim to the Sessions G Court under s. 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). Her claim was dismissed by the Sessions Court Judge and the money in the bank accounts were ordered to be forfeited to the government. The appellant appealed against the decision, with the main ground of appeal being that H the Sessions Court Judge had erred when applying the presumption under s. 35 of the Act in the proceeding under s. 32(3). It was also argued that the judge had misdirected himself and it was one that was not curable under s. 422 of the Criminal Procedure Code ('CPC'). The respondent on the other hand I conceded that while the presumption under s. 35 did not apply in

A the proceedings, the appellant had failed to satisfy the requirements under s. 32(3) for the release of the money in the bank accounts and was therefore, not entitled to claim the same.

Held (allowing appeal in part):

B **(1)** The Court of Appeal in *PP v. Lim Kim Hoei & Anor* and *Jason Chan Huan Seng & Ors v. PP* had clearly decided that the presumption under s. 35 of the Act does not apply to a proceeding under s. 32(3) of the same Act. The court was bound by the decision based on the doctrine of *stare decisis* C and the rule of judicial precedent. (paras 15 & 17)

(2) With regard to the question of whether the appellant had proven on a balance of probabilities that the properties seized were not illegal properties and that she was legally entitled to D them, the burden was on the claimant to adduce sufficient credible evidence that the properties were acquired through lawful means and that the claimant was entitled to such property. (*PP v. Lim Kim Hoei & Anor, supra*). (paras 21 & 30)

E

(3) The amount of money allegedly given by the appellant's client, Jackie Lai, to set up a joint venture business, and Tan Kheng Choon, because he liked the appellant, were big amounts and given in lump sum. However both of them were not called to F give evidence. Without their evidence, the allegations were bare assertions by the appellant, unsupported by evidence. The appellant had also failed to show with credible evidence that the big sums of money credited into her accounts were not illegal property and that she was legally entitled to the G property. (paras 33, 35, 36, 39 & 55)

(4) The appellant had also failed to justify that the amount of RM200,000 credited into her account was given by her husband ('CW3'). Based on the evidence, CW3's company was not financially stable to afford giving the appellant large H sums of money consistently. Further, CW3 and the appellant gave different versions on the purpose the money was given to the appellant. (paras 40 & 43)

(5) A misdirection on standard of proof is curable under s. 422 of I the CPC provided that it has not occasioned a failure of justice (*PP v. Ishak Hj Shaari & Other Appeals,* refd). In the

present case, there was no prejudice or failure of justice. The proceeding under s. 32(3) was conducted in accordance with the law and the appellant was given a fair chance to prove her claim by calling witnesses. Even if the Sessions Court Judge applied the wrong burden by invoking the presumption under s. 35, the fact still remains that under s. 32(3) the appellant has to show on the balance of probabilities that the properties seized were not illegal properties. Therefore, there had been no prejudice or failure of justice. Section 422 of the CPC was thus applicable here. (paras 70 & 72-74)

Case(s) referred to:
Cherian KC George & Anor v. PP [2012] 6 CLJ 17 CA ***(refd)***
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***
Jason Chan Huan Seng & Ors v. PP [2014] 1 LNS 1051 CA ***(foll)***
Loi Sui Chi & Satu Lagi lwn. PP [2011] 10 CLJ 430 HC ***(foll)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA ***(refd)***
PP v. Lim Kim Hoei & Anor [2014] 4 CLJ 816 CA ***(foll)***
Ratna Ammal v. Tan Chow Soo [1967] 1 LNS 137 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Dangerous Drugs Act 1952, s. 39B
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 2, 25(1), (2), 32(3), 35

For the appellant - Ranjit Singh Dhillon; M/s J Kaur Ranjit & Assocs
For the prosecution - Charanjit Singh; DPP

Reported by Lyana Shohaimay

JUDGMENT

Nordin Hassan JC:

Introduction

[1] This is an appeal by the appellant against the decision of the Sessions Court Judge ('SCJ') who had dismissed the appellant's claim for certain properties and forfeited the properties under s. 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act').

[2] The properties in this case were seized by the police pursuant to s. 25(1) of the Act.

A **Background Facts**

[3] On 12 May 2011, at about 7.45am police arrested Keong Gim Chye, and Ng Chun Haw at house No. 3, Lenggok Kuda, Ayer Itam, Pulau Pinang. They were detained and later charged
B under s. 39B of the Dangerous Drugs Act 1952 for trafficking in dangerous drugs.

[4] Keong Gim Chye who was arrested for trafficking dangerous drugs is the appellant's father.

C **[5]** Upon investigation carried out by the police, the appellant was then served with notice of seizure under s. 25(2) of the Act. The appellant's bank accounts were seized by the police which are as follows:

D	Accounts	Amount
	(i) Public Bank current account No. 3140539832 (E22)	RM99,580
E	(ii) Public Bank fixed account No. 1188163408 (E23)	RM210,783.84
	(iii) Hong Leong Bank account No. 14851035835 (E24)	RM 2,024.74
F	(iv) HSBC Bank account No. 371696576025 (E31)	RM 12,278.07
	(v) RHB Bank account No. 11421300053891 (E32)	RM 1,858.20

G **[6]** On 8 July 2011, the appellant wrote to the police to claim the money in the said bank accounts.

[7] The Public Prosecutor thereafter referred the appellant's claim to the Georgetown Sessions Court under s. 32(3) of the
H Act.

[8] On 28 February 2014, the Sessions Court Judge dismissed the appellant's claim and ordered the money in the said bank accounts to be forfeited to the government.

I

Appellant's Submission

[9] Learned counsel for the appellant submitted that the learned Sessions Court Judge erred when he applied the presumption under s. 35 of the Act in the application under s. 32(3) of the same Act. He further argued that the SCJ was in error when failed to follow the decision of Court of Appeal in *PP v. Lim Kim Hoei & Anor* [2014] 4 CLJ 816 which held that the presumption under s. 35 is not applicable in the proceeding under s. 32(3) of the Act. The SCJ instead followed the decision of Court of Appeal in *Cherian KC George & Anor v. PP* [2012] 6 CLJ 17.

[10] In any event, it was submitted by appellant's counsel that this issue has been settled with the majority decision of Court of Appeal in the case of *Jason Chan Huan Seng & Ors v. PP* [2014] 1 LNS 1051 (Criminal Appeal No: P-09-182, 183, 184, 185-07-2013) where it was held that the presumption under s. 35 is not applicable to the application or proceeding under s. 32(3) of the Act. This case was empanelled by five judges with one judge giving dissenting judgement.

[11] As such it was contended that in the present case, the Sessions Court Judge had applied a wrong burden when he invoked the presumption under s. 35 of the Act in the appellant's application under s. 32(3) of the same act. The misdirection of the Sessions Court Judge was submitted not curable under s. 422 of the Criminal Procedure Code.

[12] The learned counsel also argued that the appellant has proved on the balance of probabilities that all the money in the bank accounts seized by the police in the present case is legal property and appellant is legally entitled to them.

Respondent's submission

[13] The Deputy Public Prosecutor ("DPP") conceded that with the latest decision by Court of Appeal in *Jason Chan* case, the presumption under s. 35 of the Act is not applicable to the proceeding under s. 32(3) of the same act.

[14] Be that as it may, learned DPP submitted that the appellant has failed to satisfy the requirement of s. 32(3) before the properties can be released to the appellant. It was argued that the appellant failed to show on the balance of probabilities that the properties seized are not illegal properties and she is legally entitled to them.

A **The Law**

[15] Apart from the Court of Appeal case of *Lim Kim Hoei (supra)*, the majority decision of Court of Appeal in *Jason Chan*'s case *(supra)* clearly decided that the presumption under s. 35 of
B the Act does not apply to a proceeding under s. 32(3) of the same Act.

[16] In this regard, Dato' Abang Iskandar, delivering the judgment of the court at para. 83 had this to say:

C > As such, the short answer to the first issue posed before us, must be that we are in agreement with the learned counsel for the Appellants in that the presumption of illegality against the property does not apply against a seized property which a claimant seeks to be released to him under section 32(3) of the FOP Act, as being the lawful owner of that property. Proceedings under section
D > 32(3) comes under a specific regime under the FOP Act to which the presumption of illegal property under section 35 does not apply.

[17] Therefore, this court is bound by this latest decision of
E Court of Appeal based on the doctrine of *stare decisis* and the rule of judicial precedent. As was clearly stated by Steve Shim CJSS (as he then was) in the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577:

F > It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *PP v. Datuk Tan Cheng Swee & Anor* [1980] 1 LNS 58, [1980] 2 MLJ 276. Mr. Justice Chang Ming Tat had occasion to restate the doctrine
G > in words which poignantly clear when he said:
>
> > It is necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accept unreservedly and which it expect the High Court and other inferior courts in a common law system such as ours to follow similarly.

H

[18] Reverting back to *Jason Chan*'s case *(supra)*, the court explained further with regards to the requirement to be fulfilled by claimant before the property seized can be released to the claimant.

I

[19] The Court of Appeal in this case stated that the claimant in a proceeding under s. 32(3) of the Act has to prove on the balance of probabilities that the property is not illegal property and he is legally entitled to it. This is clearly stated at para. 73 of the said judgment:

> (73) The provisions of section 32 of the FOP allow any person to stake claim over a property that was seized by the Police within 3 months of its seizure. To our mind, the gist of the matter is, as a claimant, he will have to prove his claim on the balance of probabilities, just like any person in a civil case who wants judgment to be entered in his favour by the Court. That burden is shouldered by the claimant under section 32(3) not because the presumption under section 35 applies to the proceeding under section 32(3), but because he has to prove his case in order that the Court is satisfied and gives judgement in his favour. Again the case of *Tan Lee Kok (supra)* is an authority on point.

[20] The court also emphasised that the claimant must lead affirmative evidence to prove that the property seized is not illegal property as stated at para. 60 of the judgment as follows:

> At this juncture, suffice for us to say that those 2 phrases differ in substance and material particulars in relation to the burden of proof that pertains to each of the situations that was adverted to. We note that the former phrase has its origin under section 35 while the latter phrase has its origin from section 32(3) of the FOP Act. Clearly, *ex facie*, they do not provide for the same nature of evidential proof. While the former phrase is a consequence of a statutory presumption, where the nature of the evidence that is required from the liable person is in the nature of rebuttal evidence, the latter phrase requires affirmative proof coming from the claimant that he is lawfully entitled to the property, in the course of proving which he has to lead affirmative evidence to satisfy the Sessions Court judge that the property that is being claimed by him is not illegal property.

Findings Of The Court

[21] Having gone through the law, the question here is whether the appellant in this case has proved on the balance of probabilities that the properties seized are not illegal properties and she is legally entitled to them.

[22] Before we move to the merits of this case, on the issue of balance of probability, Pike CJ in the Federal Court case of *Ratna Ammal v. Tan Chow Soo* [1967] 1 LNS 137; [1967] 1 MLJ 296 at p. 299 said this:

> When one speaks of court having to be satisfied on the balance of probability one means that the higher degree of probability favours the conclusion since, if the probabilities were equally balance, the court would not have been satisfied on a balance of probability.

Therefore a higher degree of probability is required in order to prove a case on a balance of probability.

[23] Now we move to the evidence in relation to the properties seized from the appellant in the present case.

[24] The appellant worked as a guest relation officer from 2001 until 2008 and was said to earned about RM6,000 to RM10,000 per month.

[25] In regard to the money in the appellant's Public Bank account No. 3140539832 (E22) of which the balance amount is RM99,580 the explanation given by the appellant of its sources when shown the detail statement of account (P3) are as follows:

No	Date	Amount credited	Appellant's explanation
1	18 May 2007	RM50,000	given by Jackie Lai to set up business with him.
2	8 June 2007	RM20,000	given by her client Tan Kheng Choon as he like her.
3	8 April 2008	RM45,000	given by her grandmother.
4	25 May 2008	RM38,000	given by Tan Kheng Choon.
5	22 September 2008	RM32,000	this amount was transferred from her account in Hong Leong Bank.

No	Date	Amount credited	Appellant's explanation
6	27 November 2008	RM80,000	this amount was her marriage gift by guest during her marriage reception in Penang and Kuala Lumpur (p. 141 appeal record).
7	18 December 2008	RM16,000	given by her husband (CW3).
8	10 January 2009	RM25,000	given by her husband.
9	11 January 2009	RM20,000	given by her husband.
10	4 March 2009	RM54,500	appellant could not remember its source (p. 141 appeal record).
11	27 April 2009	RM150,000	repayment of loan given by appellant to a friend's friend whom name she cannot remember (p. 141 appeal record).
12	27 July 2009	RM25,000	repayment of loan given by appellant to someone whom the name was not mentioned in her evidence (p. 142 appeal record).
13	28 July 2007	RM25,000	repayment of loan given by appellant to someone not named in her evidence.
14	4 February 2010	RM15,000	given by her husband.
15	21 September 2010	RM12,500	given by her husband.
16	20 October 2010	RM20,054.80	Insurance money paid by Hong Leong Insurance.
17	1 November 2010	RM16,000	proceeds from the sale of her boutique.
18	4 November 2010	RM16,000	proceeds from the sale of her boutique.

No	Date	Amount credited	Appellant's explanation
19	26 November 2010	RM30,000	given by her husband.
20	18 January 2011	RM22,000	given by her husband.
21	14 February 2011	RM15,000	given by her husband.
22	16 March 2011	RM12,000	given by her husband.
23	25 April 2011	RM35,000	given by her husband.
24	9 May 2011	RM11,000	given by her husband.

[26] As to the appellant's Public Bank fixed account No. 1188163408 (E23) with an amount of RM210,783.84, appellant explained that this amount was given by Jackie Lai and Tan Kheng Choon but did not said for what purpose.

[27] Next, with regard to Hong Leong Bank account No. 14851035835 (E24) with an amount of RM2,024.26, the appellant explained that this account was her savings from commission as insurance agent with HLA Insurance.

[28] In regard to HSBC Bank account No. 371696576025 (E31) with the amount of RM12,278.07, the appellant explained that the money was given by her husband (CW3) and proceeds from her boutique business.

[29] As to the appellant's RHB Bank account No. 11421300053891 (E32) with the balance amount of RM1,858.28 she said that this amount was her savings when working as guest relation officer.

[30] As pointed out in the case of *PP v. Lim Kim Hoei & Anor (supra)* that the burden of a claimant of seized properties is to adduce sufficient credible evidence that the properties were acquired through lawful means and the claimant were lawfully entitled to such properties.

[31] Reverting to the present case, my duty is to assess whether there are sufficient credible evidence put forth by the appellant that can justify the released of the seized properties.

[32] I now deal with the property (E22) Public Bank current account No. 3140539832.

[33] The appellant explained that on 18 May 2007, RM50,000 was given by her client Jackie Lai for the purpose to set up a joint venture business. However no details about the said business was given such as the type of business, where and when the business to be set up. The fact remains that until 2011, when this account was seized, no evidence to show the existence of the said business with Jackie Lai.

[34] The other pertinent observation to be made here is that the appellant also said that she gave loans to others from this account. The total amount of loans involved were RM200,000. The question here, if the RM50,000 given by Jackie Lai was to set up business, how then the appellant used the said money in the same account which includes the said RM50,000 to give loans to others. Thus the contention that RM50,000 was from Jackie Lai, I found difficult to accept. Furthermore Jackie Lai was not called to confirm this fact.

[35] On the 8 June 2007, RM20,000 and on 25 May 2008 RM38,000 were credited into this account and the appellant explained that these amount was given by one Tan Kheng Choon because he likes her. Tan Kheng Choon was also not called to give evidence.

[36] The evidence of Jackie Lai and Tan Kheng Choon, if called would support the appellant's contention that the money were given by them. This will establish a sufficient credible evidence as required by the law.

[37] In this regard, I am agreeable with the decision in the case of *Loi Sui Chi & Satu Lagi lwn. PP* [2011] 10 CLJ 430 where the court rejected the explanation by claimant that the S$70,000-S$80,000 was given by her boyfriend as he was not called to support the claimant's evidence.

[38] In *Loi Sui Chi*'s case at para. 19 the reasons given for not accepting the claimant's contention is as follows:

> [19] Perayu pertama menyatakan wang yang disita adalah wang yang diberikan oleh Kenneth Koh dan pelanggan beliau serta wang gaji beliau. Mahkamah ini meragui benarkah Kenneth Koh yang hanya dikatakan sebagai teman telaki sanggup memberi S$70,000-

A S$80,000 kepada seorang teman wanita. Wang yang kononnya diberikan sekaligus adalah tidak munasabah memandangkan jumlah yang terlibat adalah terlalu besar (lebih kurang RM168,000-RM192,000 jika dikira kepada tukaran S$1.00 bersamaan dengan RM2.40). Sekiranya benar wang sebanyak itu telah diberikan oleh Kenneth Koh, mengapa saksi itu yang masih dapat dihubungi dan berada di Singapura tidak dipanggil untuk memberi keterangan. Begitu juga saksi daripada Public Bank tidak dipanggil untuk menyatakan jumlah pembayaran cukai pendapatan oleh perayu pertama. Saya bersetuju dengan dapatan Tuan HMS bahawa dakwaan perayu pertama beliau diberi wang oleh Kenneth Koh dan beliau ada membayar cukai pendapatan hanyalah satu dakwaan kosong semata-mata.

[39] Likewise in the present case, the amount of money given by Jackie Lai and Tan Kheng Choon were big amount and given in a lump sum to the appellant. Without the evidence of both named persons, it is just a bare assertion by appellant, unsupported by evidence.

[40] Apart from this, as explained by the appellant that a total of RM200,000 in this account were given by appellant's husband over the period of three years. Her husband (CW3) gave evidence to support her contention. However based on the evidence available, it shows that CW3 and his company Megatro Engineering was not financially stable to afford giving the appellant large sums of money consistently as shown earlier.

[41] Apart being the director of Megatro Engineering, CW3 had to work full time with another company Unibrite Electrical with a salary of RM4,200 per month. If CW3 is financially stable, CW3 does not have to work with another company with a salary of only RM4,200 per month.

[42] On top of this, the secretary of Megatro Engineering, Wong Mon Lam ('CW4') testified that she has no knowledge of the company physical operation and based on the balance sheet (D16), the company only had RM4,823.14 in its account as at 31 December 2012. In cross-examination, CW4 agreed that the company business was not doing well as there was no cash flow. All these facts only shows that appellant's husband could not afford to gave her the amount of money as contended by the appellant which were credited in this account.

[43] As the purpose of the money given by CW3 to the appellant, I found both CW3 and appellant gave different versions. The appellant said the money was '*nafkah*' given by her husband but CW3 said that the money was wages for the appellant for helping CW3 to run the company. CW3 later said that it was payment for administrative fees to the appellant.

[44] Based on the above reasons, it is difficult for appellant to justify that the said amount of RM200,000 which was credited in the appellant's account was given to her by her husband ('CW3').

[45] Next, on 20 October 2010, the appellant said he received RM20,054.80 insurance money from Hong Leong Insurance. No document to support this contention were put forth and in cross-examination, the appellant then changed her story and said that this amount was proceeds from an investment scheme known as 'Wealth Golden Plan'. This conflicting version is far from being a credible evidence.

[46] As mentioned earlier, big sum of money about RM200,000 were given as loan by appellant to others. No details about these loans were given by the appellant, not even the debtors, name or any documentation to substantiate this contention.

[47] Apart from this on 8 April 2008 appellant said RM45,000 was given by her grandmother as wedding gift and credited in this account.

[48] Based on the evidence, appellant came from a broken family as her parents were divorced when she was small and she then had to stay with her grandmother. At the age of 19 she had to quit study and worked at a night club due to the financial constraint.

[49] On this fact, it is a reasonable inference that the grandmother is also not financially stable because if not she could support her study and she does not have to work at the night club.

[50] Therefore, the contention that RM45,000 was from her grandmother is highly improbable. Her grandmother had passed away and unable to support her contention.

[51] On 22 September 2008, the amount of RM32,000 was credited in this account and appellant said it was a transfer of fund from her account in Hong Leong Bank. No document to show this transfer was produced by the appellant.

[52] Next, on the 27 November 2008, RM80,000 was credited into this account and the explanation is that this was her marriage gift by guests who attended her marriage reception. Aside from her marriage invitation card, no other evidence to support the appellant's contention.

[53] On 4 March 2009, RM54,500 was credited into this account but the appellant could not remember its source. To my mind it is strange not to remember the source of a big sum of money that was credited in the appellant's account.

[54] On 1 November 2010 and 4 November 2010 and amount of RM32,000 were credited in this account. Appellant testified that this amount is proceeds from the sale of her boutique. Here also no supporting evidence was put forth either oral or documentary.

[55] Having gone through the whole evidence pertaining to this property, I am of the view that appellant failed to show with credible evidence that the money in this account (E22) is not illegal property and she is legally entitled to this property.

[56] Next seized account claimed by the appellant is Public Bank fixed account No: 1188163408 with an amount of RM210,783.84 (E23). It was explained by the appellant that the contributor for this amount were Jackie Lai and Tan Kheng Choon. Again both named persons were not called to support her contention.

[57] The appellant also contended that her father, Keong Gim Chye credited RM50,000 in this account *vide* Public Bank cheque No: 352081.

[58] It is important to state here again that appellant's father, Keong Gim Chye was charged under s. 39B of the Dangerous Drugs Acts 1952 for trafficking dangerous drugs. As such the amount of RM50,000 credited by Keong Gim Chye into the appellant's account derived from prohibited activity cannot be ruled out.

[59] As such, the appellant also failed to show that the money in this account (E23) is not illegal property and she is legally entitled to this property.

[60] Before I proceed further, it is pertinent to note here that s. 2 of the Act defined 'illegal property' as follows:

illegal property means:

(a) which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any persons after the commencement of this Act;

(b) which in the income, earnings or assets wholly or partly derived or obtained from or by means of any property referred to in paragraph (a);

(c) which is wholly or partly derived or obtained from or by means of any property referred to in paragraph (a) or (b);

(d) which is wholly or partly traceable or attributable to any property referred to in paragraph (a), (b), or (c), or to any income, earnings or assets of any such property;

(e) …

(f) …

(g) …

[61] Thus if it can be shown even part of the property derived or obtained from prohibited activity, the property is considered as illegal property. Likewise property E23 is illegal property even only part of the property derived from prohibited activity.

[62] The other appellant's bank accounts that were seized are:

(i) Hong Leong bank account No. 14851035835 (E24) with an amount of RM2,024.74.

(ii) HSBC bank account No. 371696576025 (E31) with an amount of RM12,278.07.

(iii) RHB bank account No. 11421300053891 (E32) with an amount of RM1,858.20.

[63] The appellant explained that the money in (E24) was her commission as an insurance agent with HLA Insurance. The appellant could have furnish any document to show that she was an insurance agent but failed to do so. No other evidence was produced to support her claim.

[64] As regards the account in HSBC (E31) the appellant claimed that the money was her savings from money given by her husband and proceeds from her boutique business. Again no evidence to support this contention.

[65] As to the account in RHB (E32) the appellant explained that the money was her savings while working as guest relation officer.

[66] As mentioned earlier, the appellant contended that when she worked at the night club, she earned about RM6,000 to RM10,000 per month. No document or salary slip was shown to support the amount of salary as claimed. However even with a lesser income and having worked from 2001 until 2008, the amount saved as in (E32) which is RM1,858.20 is very reasonable. As such I am of the view that the appellant has succeeded in showing that property marked (E32) is not illegal property and she is entitled to this property.

[67] However, let me state here that nothing in evidence except the appellant's assertion to show that the appellant earned about RM6,000 to RM10,000 while working at the night club. In any event the amount credited in accounts (E22) and (E23) involved big amount and in lump sum. The amount credited does not show that it comes from the appellant's salary while working as GRO.

[68] Before I conclude, the learned counsel for the appellant had raised an issue that the Sessions Court Judge misdirected herself on the burden of proof by applying the presumption under s. 35 of the Act, hence it is not curable under s. 422 of the CPC and the appeal should be allowed even on this ground alone without having to go into the merits of the case.

[69] I am not agreeable with the counsel's contention as shown clearly in the latest Court of Appeal case of *Jason Chan (supra)* where the court went in detail into the merits of the case even the Sessions Court and High Court were in error when applying the presumption under s. 35 of the Act.

[70] Beside *Jason Chan*'s case, in the Court of Appeal case of *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843, it was held that a misdirection on standard of proof is curable under s. 422 of the CPC provided that it has not occasioned a failure of justice.

[71] Mohd Noor Ahmad JCA (as he then was) delivering judgment of the court at pp. 860 and 861 had this to say:

> And the misdirection on the standard of proof at the end of the trial involved a breach of the basic principle of criminal law, that is to say, the cardinal principle in criminal law in the duty of the prosecution to prove the guilt of the accused beyond all

> reasonable doubt. In short, the first breach is a breach of an explicit provision of the CPC, and the second breach involves a principle of general importance in the administration of justice. Although the respective learned High Court Judges had given the right reasons for the breaches, with due respect, we do not agree with their conclusions that the misdirection were illegalities for which for which s. 422 of the CPC could not be invoked to cure the breaches without proper consideration as to whether or not the misdirection had occasioned a failure of justice. The words 'unless such error, omission or irregularity ... has occasioned as failure of justice' at the end of s. 422 qualify the entire section. In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated.

The learned JCA goes on to say at p. 861 as follows:

> If the trials were conducted in a manner or mode different from that prescribed by the CPC the trials were bad and the question of curing an irregularity did not arise, but if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the course of such conduct the irregularity could be cured under a s. 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC. From the respective record of appeal we are satisfied that the trials of the respondents had been conducted substantially in the manner prescribed by the CPC but the misdirection on the standard of proof only arose in the conduct of the trial. That being the case, again guided by the Indian cases, the misdirection could be cured under s. 422.

[72] Likewise in the present case, there is no prejudice or failure of justice. The proceeding under s. 32(3) was conducted in accordance with the law and the appellant was given fair chance to prove her claim by calling witnesses. She was also represented by a counsel in the proceeding.

[73] Even if the Sessions Court applied the wrong burden by invoking the presumption under s. 35 of the Act and as such the appellant has to rebut the presumption that the properties seized is illegal properties, the fact still remains that under s. 32(3) the appellant has to show on the balance of probabilities that the properties seized are not illegal properties.

[74] Therefore there has been no prejudice or failure of justice in this case because of the application of wrong burden of proof. As such s. 422 of the CPC is applicable here.

Conclusion

[75] Based on the above said reasons, the appellant had failed on the balance of probabilities to show that properties identified as item E22, E23, E24 and E31 are not illegal properties and that the appellant is lawfully entitled to them.

[76] However, I am satisfied that the property identified as E32 is not illegal property and the appellant is entitled to it.

[77] Therefore the appeal is allowed in part and order that property identified as item E32 be released to the appellant. The decision by Sessions Court judge on other properties identified as E22, E23, E24 and E31 is hereby affirmed.